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No. 95-329

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN R. DOOLITTLE, PETITIONER

v.

NATIONAL CREDIT UNION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had notice and an opportunity to be heard regarding one of the administrative findings that was a prerequisite to the order barring him from further participation in the conduct of the affairs of a federally chartered or insured financial institution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Jameson v. *FDIC*, 931 F.2d 290 (5th Cir. 1991)	7
Van Dyke v. *Board of Governors*, 876 F.2d 1377 (8th Cir. 1989)	7

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause)	6
12 U.S.C. 1766	2
12 U.S.C. 1786(g)(1)(A)	2, 4
12 U.S.C. 1786(g)(1)(B)	2-3, 8
12 U.S.C. 1786(g)(1)(B)(iii)	7
12 U.S.C. 1786(g)(1)(C)	3, 5
12 U.S.C. 1786(g)(2)	2
12 U.S.C. 1786(g)(4)	3
12 U.S.C. 1786(g)(7)	2
12 C.F.R. 702.3	4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a3-a4) is unpublished, but the decision is noted at 48 F.3d 536 (Table). The earlier opinion of the court of appeals (Pet. App. a17-a32) is reported at 992 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. The petition for rehearing was denied on May 16, 1995 (Pet. App. a1-a2). The petition for a writ of certiorari was filed on August 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Credit Union Administration (NCUA) Board is the independent federal agency that charters, insures, and regulates federal credit unions. Under the Federal Credit Union Act (FCU Act), the Board's enforcement responsibilities are akin to those of the FDIC, the Office of Thrift Supervision, the Comptroller of the Currency, and the Federal Reserve Board, which oversee the regulated functions of other financial institutions. 12 U.S.C. 1766.

The NCUA Board has authority to remove a credit union official from office or prohibit the official's further participation in the conduct of the affairs of any insured credit union. See 12 U.S.C. 1786(g)(2). Such action has the effect of barring the official's participation in the affairs of any federally insured financial institution. See 12 U.S.C. 1786(g)(7). To take such action, the Board must first issue a Notice of Intent that includes three determinations. First, the Board must find misconduct; it must find that the "institution-affiliated party has, directly or indirectly[,] (i) violated * * * any law or regulation; * * * (ii) engaged or participated in any unsafe or unsound practice in connection with any insured credit union or business institution; or (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. 1786(g)(1)(A). Second, the Board must find that the misconduct had a proscribed effect: that, as a result of the misconduct, either the credit union "has suffered or will probably suffer financial loss or other damage," or the members' interests "have been or could be prejudiced," or the party has "received financial gain or other benefit." 12 U.S.C.

1786(g)(1)(B). Third, the Board must determine that the violation, practice, or breach either involves personal dishonesty or "demonstrates such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union." 12 U.S.C. 1786(g)(1)(C). After a hearing on such charges, if the Board finds "upon the record * * * that any of the grounds specified in [the] notice have been established," it may issue an order of removal or prohibition. 12 U.S.C. 1786(g)(4).

2. Petitioner was employed by Bay Gulf Federal Credit Union, in Tampa, Florida, for approximately 18 years, serving as the compensated manager/president and as a member of the Board of Directors from January, 1982, until his forced resignation in April, 1990. Pet. App. a18. An NCUA examination of Bay Gulf as of December 31, 1989, showed that the credit union had suffered net losses in 1988 and 1989 and had material weaknesses, suggesting that its solvency could be significantly affected by adverse economic changes. Gov't C.A. Br. 8. A rating of Bay Gulf's management competence was downgraded. Pet. App. a25.

3. In February, 1991, the NCUA Board issued a "Notice of Intent to Prohibit and Impose Other Remedial Sanctions" to petitioner, charging him with violations of the FCU Act, the agency's regulations, Bay Gulf's bylaws, and generally accepted accounting principles; unsafe and unsound practices; and breach of his fiduciary duty. Pet. App. a18. The Notice of Intent set forth five counts against him. *Id.* at a19. Four counts charged violations of the NCUA's regulations requiring that a credit union's financial statements make "full and fair disclosure" of all assets, liabilities, equity, income, and expenses for the period

concerned, 12 C.F.R. 702.3. The fifth charged petitioner with unsafe and unsound practices and breach of fiduciary duty concerning certain improper commercial loans. Pet. App. a19-a22.

Following a three-day hearing, an ALJ rendered a decision recommending the issuance of an order of prohibition and restitution against petitioner on the ground that the NCUA had sustained its burden of proving all five counts. Pet. App. a19. Petitioner filed exceptions with the NCUA Board. In a final decision issued on October 15, 1991, the NCUA Board adopted the ALJ's decision and ordered that petitioner be prohibited from participating in the affairs of any federally insured or chartered institution, and that he pay restitution to Bay Gulf in the amount of $42,857. *Ibid.*

4. Petitioner sought judicial review of the NCUA Board's order, and the court of appeals upheld two counts and a portion of a third count against petitioner, noting that petitioner's "conduct in these matters implies intentional misrepresentation of the financial condition of Bay Gulf." Pet. App. a24. However, finding a lack of substantial evidence to support the remaining counts against petitioner, the court vacated the order of prohibition and remanded to the NCUA Board for reconsideration. *Id.* at a27. The court also reversed the order of restitution. *Id.* at a32.

5. Upon further briefing by the parties following remand, the NCUA Board reinstated its order of prohibition against petitioner. Pet. App. a5-a15. With respect to the first and third prongs of the standard for prohibition, the NCUA Board found that petitioner had engaged in intentional misconduct under 12 U.S.C. 1786(g)(1)(A) (see Pet. App. a7-a9), and that

petitioner's conduct "demonstrate[d] [his] unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union" under 12 U.S.C. 1786(g)(1)(C) (see Pet. App. a11-a14).

The Board also found that the "effects" prong of the statutory standard was satisfied on two bases. First, the Board found (Pet. App. a9-a10) that petitioner's misconduct led Bay Gulf's volunteer board of directors unwittingly to take the dangerous step of paying dividends for the first quarter of 1990 while unaware that the credit union had insufficient earnings to do so. Second, the Board found that petitioner received personal benefit as a result of his misconduct. Pet. App. a10. The Board stated that, given the NCUA's then-recent downgrading of the competency of Bay Gulf's management for its inability to improve the credit union's financial condition, petitioner "was probably under some pressure to show a profit," and that he therefore "personally benefitted" from his misconduct when, as a result of being able to show the hoped-for profit, he retained his job. *Ibid.* (quoting *id.* at a25); see *id.* at a10 n.4.

6. Petitioner again sought judicial review. On February 15, 1995, the court of appeals upheld the order of prohibition without comment in an unpublished order. *Id.* at a3-a4.

ARGUMENT

Petitioner's primary claim of error (Pet. 7-8) is that the court of appeals upheld the NCUA Board's finding on remand that petitioner had obtained a "personal benefit" (Pet. App. a10) from his misconduct, despite the court's statement in the first appeal that the Notice of Intent did not allege (and the record

did not show) that petitioner derived any "personal gain" from his misconduct. *Id.* at a18. Petitioner asserts that he therefore had no notice or opportunity to be heard regarding whether he obtained a "personal benefit" or "personal gain," and that that failure violated the Due Process Clause of the Fifth Amendment. Pet. 8.

Petitioner's claim is meritless. The "personal benefit" theory was raised at the very start of the administrative proceedings, and petitioner had ample opportunity to litigate that issue. NCUA counsel explained in her opening statement at the hearing before the NCUA's administrative law judge that the government would show that, although petitioner "may not have had any personal financial gain, his conduct was geared to obtain a personal benefit for himself." 1 Hearing Tr. 12. She explained that the "benefit to [him] from these accounting maneuvers, given his position as General Manager, is clear: If the credit union looked good, he would look good, and his job would be protected." *Id.* at 14. See Pet. App. a10 n.4. Petitioner had more than adequate opportunity to be heard on the issue at that hearing and at later proceedings in this case before the NCUA and the court of appeals. Although he was unable to rebut the clear import of the evidence on that point, his failure to do so was not the result of any procedural irregularity.

Petitioner's claim also appears to be based on a misreading of the language of the applicable statute. The FCU Act does not limit the sanction of an order of prohibition to those cases in which it can be shown that the subject of the order received "personal gain" (Pet. 8), which petitioner presumably understands to mean direct payments of funds to which he was not legally entitled. Instead, the Act provides authority

to impose an order of prohibition if the person "received financial gain *or other benefit* by reason of such violation." 12 U.S.C. 1786(g)(1)(B)(iii) (emphasis added). As the language of the provision makes clear, "financial gain" (what petitioner refers to as "personal gain") and "other benefit" (what the NCUA Board referred to as "personal benefit") are independent bases for satisfying the statutory requirement.* Thus, even if there were no financial gain—that is, no *monetary* benefit, see, *e.g.*, *Jameson* v. *FDIC*, 931 F.2d 290, 291 (5th Cir. 1991) (concealing bonus); *Van Dyke* v. *Board of Governors*, 876 F.2d 1377, 1379 (8th Cir. 1989) (check-kiting scheme)—that would not mean that a non-monetary "other benefit" could not exist. As the court of appeals recognized, petitioner "was probably under some pressure to show a profit for the first quarter of 1990 so that Bay Gulf could declare a dividend." Pet. App. a25. For petitioner, then, there was the very real "other benefit" of enhancing his stature (and thus protecting his job) with Bay Gulf's board of directors, who had just been made

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* For this reason, petitioner's reliance on the statement by the court of appeals that he had derived no "personal gain" (Pet. 8) is misleading. The court of appeals stated in its first opinion that the "Notice of Intent did not allege and the record does not indicate that [petitioner] derived any personal gain" from his misconduct. Pet. App. a18. But it went on to suggest in that same opinion that the misconduct may have occurred because petitioner "was probably under some pressure to show a profit * * * so that Bay Gulf could declare a dividend." *Id.* at a25. Thus, as the court of appeals necessarily found in ultimately upholding the order of prohibition, the NCUA Board's finding that petitioner derived a "benefit" from his misconduct by avoiding the threat that lay behind this pressure to turn a profit, *id.* at a10, is consistent with both the Notice of Intent and the earlier decision of the court.

aware that his management had been downgraded for failure to improve Bay Gulf's financial condition in 1988 and 1989.

In any event, even if the Board's finding of personal benefit were defective, the order of prohibition would nonetheless be valid on the basis of the Board's alternative "effects" finding (Pet. App. a8-a9) that petitioner's misconduct prejudiced the interests of the credit union members. Because of petitioner's misconduct, the credit union's board of directors paid dividends at a time when it did not have the earnings to support them. As the Board observed, that practice "threatens the financial soundness of a credit union and can lead to the institution's insolvency." *Id.* at a9. It therefore "prejudice[d]" the interests of the members of the credit union. 12 U.S.C. 1786(g)(1)(B). Contrary to petitioner's contention (Pet. 8 n.2), this issue was involved in the proceedings from the beginning. See 1 Hearing Tr. 11-12 (opening statement of NCUA counsel at administrative hearing that "the [government] will * * * show that, by reason of [petitioner's] conduct, * * * the interests of the members have been prejudiced").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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